

The Honorable Judge Salvador Mendoza
Hearing Date: May 1, 2015
Trial Date: August 17, 2015

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

GEORGE TERRY LANGLEY,

Plaintiff,

v.

GEICO GENERAL INSURANCE
COMPANY,

Defendant.

No. 1:14-cv-03069-SMJ

**REPLY RE: MOTION TO
COMPEL APPRAISAL OF
PLAINTIFF'S LOSS OF USE
DAMAGES**

**NOTE ON MOTION CALENDAR:
May 1, 2015**

I. REPLY

A. Controlling Authority

The appraisal process affords parties an opportunity to select third parties to help determine an agreed-upon value of losses sustained by the insured. 5-53 New Appleman on Insurance Law Library Edition § 53.07 [2][b]. According to Appleman:

A typical appraisal clause provides that where the insurer and insured fail to agree on the amount of the loss, either one can demand that the amount be set by appraisal. Each party must then select a competent, independent appraiser. The two party-selected appraisers then select a competent, impartial umpire. The party-selected appraisers then set the amount of the loss. If the appraisers

1 fail to agree within a reasonable time, they must submit their
2 differences to the impartial umpire. Written agreement signed by
3 any two of these three parties then typically sets the amount of the
loss.

4 5-53 New Appleman on Insurance Law Library Edition § 53.07 [2][b]

5 Nothing in Appleman restricts appraisal to the actual cash value of the
6 vehicle. To the contrary, the appraisal process can vary based on the terms of the
7 particular insurance policy. *Id.* Therefore, the terminology of the appraisal
8 provision is interpreted in accordance with basic contract law principles. *Citizens*
9 *Prop. Ins. Corp. v. M.A. & F.H. Props., Ltd.*, 948 So. 2d 1017 (Fla. Dist. Ct. App.
10 2007).

11 The GEICO appraisal provision is as follows:

12
13 SECTION III: PHYSICAL DAMAGE COVERAGES
14 CONDITIONS
15 6. APPRAISAL

16 If **we** and the **insured** do not agree on the amount of **loss**, either
17 may, within 60 days after proof of loss is filed, demand an appraisal
18 of the **loss**. In that event, we and the **insured** will each select a
competent appraiser. The appraisers will select a competent and
19 disinterested umpire. The appraisers will state separately the **actual**
cash value and the amount of the **loss**. If they fail to agree, they will
20 submit the dispute to the umpire. An award in writing of any two
will determine the amount of the **loss**. We and the **insured** will each
21 pay his chosen appraiser and will bear equally the other expenses of
the appraisal and umpire.

22 ECF No. 6-A at 16 (emphasis in original).

1 According to the plain language of the provision, if there is a value
2 dispute between the insured and the insurer regarding the amount of loss,
3 not just the actual cash value of the pre-loss RV, either party may invoke
4 appraisal.

5
6 **B. Appraisal of Loss of Use is Expedient & Cost Effective**

7 In the present case, plaintiff has retained Mr. Smith as both a damages
8 expert and appraiser. In this unusual dual-capacity, Mr. Smith produced a loss of
9 use report detailing plaintiff's claimed loss of use damages in excess of \$156,000.
10 These damages are inextricably linked to the loss of the RV. GEICO does not
11 agree with plaintiff's valuation and requests appraisal of the amount of the loss to
12 include plaintiff's alleged loss of use damages.
13

14 Appraising plaintiff's loss of use damages not only comports with the
15 appraisal provision, it will resolve the issue expeditiously and with less cost to
16 plaintiff. Plaintiff, Mr. Smith, and any of plaintiff's other witnesses can testify to
17 loss of use at the currently scheduled appraisal hearing set for May 28, 2015, in
18 Yakima, WA. There will be no need for anyone to travel outside the local area.
19 There is similarly no need to set a separate appraisal hearing.
20

21 GEICO's experts Scott Twomey and Greg Volhontseff will offer testimony
22 on both plaintiff's claimed loss of use damages and actual cash value. Because
23 the exact same witnesses from both sides will testify to essentially the same facts,

1 there is good cause to appraise plaintiff's claimed loss of use damages. There
2 will be no delay of the hearing and plaintiff will pay no additional fees. To the
3 extent plaintiff argues that GEICO is trying to stall, delay, or cause additional
4 expense, plaintiff misconstrues GEICO's motion.
5

6 **C. Appraisal of Loss of Use Conserves Judicial Resources**

7 Appraising plaintiff's claimed loss of use damages will also conserve
8 limited judicial resources. If the amount of plaintiff's loss of use damages can be
9 set outside litigation, trial will be streamlined and the jury will not waste time
10 deliberating needless issues. In addition, there will be far less cost to plaintiff
11 because far less expert testimony will be required.
12

13 **D. Reservation on Coverage Issue**

14 Plaintiff argues that the policy does not cover loss of use damages: "There
15 is no contractual coverage provided under the policy for lost usage or lost
16 enjoyment or any lost transportation benefits." ECF No. 128 at 3. If plaintiff's
17 interpretation of the policy is correct, GEICO may never have owed plaintiff a
18 contractual duty to pay for loss of use of his RV. Further, contrary to plaintiff's
19 contention that loss of use is a non-contractual claim, this Court ruled that loss of
20 use is "inherently a matter of damages, which is not an independent claim." ECF
21 No. 119 at 13.
22
23

1 However, the issue of whether or not the policy covers loss of use is a
2 question of law that is not before the Court at this time. The only issue before
3 this Court is the valuation dispute regarding plaintiff's loss of use damages which
4 is properly subject to appraisal. GEICO reserves the issue of whether or not
5 plaintiff has a legal right to recovery for future determination, if necessary.
6

7 The appraisal provision at issue in this case states: "The appraisers will
8 state separately the actual cash value and the amount of the loss." ECF No. 122
9 at 2. Plaintiff contends this provision should be read so that the appraisal can
10 only cover the pre-loss actual cash value of the plaintiff's RV. However, such a
11 reading nullifies the remaining language requiring the appraisers to state
12 separately both the actual cash value and the amount of loss. Plaintiff's reading
13 does not give meaning to all the expressed terms within the provision. Therefore,
14 it fails to comport with basic contract law principles of interpretation.
15

16 GEICO respectfully suggests its appraisal provision should be construed
17 broadly to encompass damages arising as a direct consequence of a covered loss.
18 Accordingly, appraisal is the appropriate process for determining plaintiff's loss
19 of use damages because plaintiff's claim for loss of use damages arises as a direct
20 consequence of a covered loss.
21

22 //

23 //

1 **II. CONCLUSION**

2 The parties do not agree on the amount of loss of use damages
3 contemplated under the appraisal provision of the policy as a direct consequence
4 of the covered loss. As such, GEICO respectfully moves this Court to include
5 plaintiff's loss of use claim in the May 28, 2015, appraisal.
6

7 DATED this 30th day of April, 2015, in Seattle, Washington.

8 **COLE | WATHEN | LEID | HALL, P.C.**

9 /s/Rory W. Leid

10 Rory W. Leid, III, WSBA #25075

11 /s/Jonathan R. Missen

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CERTIFICATE OF SERVICE

The undersigned makes the following declaration certified to be true under penalty of perjury pursuant to RCW 9A.72.085:

On the date given below, I hereby certify that I caused the foregoing to be filed using the United States District Court for Eastern District of Washington – Document Filing System (CM/ECF) and a true and correct copy to be delivered on the following in the manner indicated:

<u>Plaintiff Counsel</u> David B. Trujillo Law Offices of David B. Trujillo 4702A Tieton Drive Yakima, WA 98908 (509) 972-3838 WSBA #25580	<input type="checkbox"/> Via Fax (509) 972-3841 <input type="checkbox"/> Via ABC Legal Messenger <input type="checkbox"/> Via Email tdtrujillo@yahoo.com <input type="checkbox"/> By Depositing Into U.S. Mail 1 st Class Postage Pre-Paid <input checked="" type="checkbox"/> Via ECF/Electronic Court Filing
<u>Plaintiff Counsel</u> Kirk D. Miller Kirk D. Miller, P.S. 421 W. Riverside Ave., Ste. 704 Spokane, WA 99201 (509) 413-1494 WSBA # 40025	<input type="checkbox"/> Via Fax <input type="checkbox"/> Via ABC Legal Messenger <input type="checkbox"/> Via Email kmiller@millerlawspokane.com <input type="checkbox"/> By Depositing Into U.S. Mail 1 st Class Postage Pre-Paid <input checked="" type="checkbox"/> Via ECF/Electronic Court Filing

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct

Executed this 30th day of April, 2015, at Seattle, Washington.

COLE | WATHEN | LEID | HALL, P.C.

/s/ Tami L. Foster

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